92-1476

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

E.M. SCHULZE, JR.,

Petitioner

versus

SOUTH MAIN BANK,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a judgment in a civil case directing petitioner to "work" for a governmental agency violates the Thirteenth Amendment's prohibition against involuntary servitude?

2. Whether it was a denial of due process to order petitioner to "work" for a governmental agency under a rule of civil procedure authorizing "such orders . . . as are just"?

3. Whether it was a denial of due process to order petitioner punished without his being notified in advance that he was subject to punishment and without affording him an opportunity to be heard?

LIST OF PARTIES

The parties to the proceedings below and in this Court are petitioner, E.M. Schulze, Jr. and respondent, South Main Bank.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas, entered in the above entitled proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas is reported at 837 S.W.2d 733 (Tex. App.-Houston [14th] 1992). (Appendix, 21.)

JURISDICTION

Petitioner seeks review of a judgment entered on August 13, 1992, by the Court of Appeals for the Fourteenth Supreme Judicial District of Texas. (Appendix, 63.) The judgment was subject to discretionary review by the Texas Supreme Court, but it, on December 16, 1992, denied petitioner's application for writ of error. On December 31, 1992, petitioner filed a motion for rehearing, and it was denied on January 20, 1993. (Appendix, 65.)

This Court has jurisdiction under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND PROCEDURAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Thirteenth Amendment to the United States Constitution:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 215(2)(b) of the Texas Rules of Civil Procedure:

> If a party or an officer, director, or managing agent of a party or a person designated under Rules 200-2b, 201-4 or 208 to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(7) When a party has failed to comply with an order under Rule 167a(a) requiring him to appear or produce another for examination,

such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expense unjust. Such an order shall be subject to review on appeal from the final judgment. (Emphasis added.)

Section 215(3) of the Texas Rules of Civil Procedure:

If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after

> notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of paragraph 2b of this rule. Such order of sanction shall be subject to review on appeal from the final judgment.

STATEMENT OF THE CASE

Petitioner is an attorney. In November of 1989, petitioner, in his capacity as counsel for Don T. Braden, was served with a motion to compel answers to discovery requests and for sanctions. (Appendix, 73.) The motion did not: (a) mention petitioner by name (other than in the certificate of service); (b) refer to petitioner in his representative capacity; (c) allege an "abuse of the discovery process;" (d) request sanctions against petitioner as an individual; (e) refer to Rule 215(2)(b) or Rule 215(3) of the Texas Rules of Civil Procedure; (f) refer to an "inherent power" of the court to sanction attorneys; or (g) request that petitioner be ordered to

perform work for a governmental agency or be sanctioned in any other manner. The motion only requested the court to compel discovery responses, to order petitioner's client to pay $500.00 in attorney's fees, and to dismiss the action if the responses to the discovery requests were not timely served.

The district judge heard the motion and then, sua sponte, went beyond the requests of South Main Bank. The court found that petitioner's client had stated "frivolous" objections to pretrial discovery requests. As punishment, the judge entered an interlocutory order directing petitioner to report to the Child Protective Services Agency of Harris County, Texas, and perform "work." The judge's order also imposed a $10,000.00 fine against petitioner's client. The interlocutory order directed the fine to be paid and the work to be performed prior to entry of final judgment. Petitioner had no opportunity to voice

objections to his being punished because he had not been informed that he might be punished.

The Texas Supreme Court, in a subsequent mandamus proceeding, without expressing any opinion whether the punishment was authorized, directed the district judge to modify his order to at least defer payment of the fine and performance of the work until petitioner and his client had exhausted their appellate rights. Braden v. Downey, 811 S.W.2d 922, 931 (Tex. 1991).

The district judge, in accordance with the Texas Supreme Court's direction, entered a final judgment, ordering the same punishments, but deferring performance until petitioner's appellate rights were exhausted. (Appendix, 66.) Prior to entry of the judgment, petitioner orally presented his constitutional objections to his being punished as an individual. And, he formally

presented his constitutional objections in a motion for new trial. The objections were carried forward in the appeal to the Court of Appeals and overruled. (Appendix 35, 46, and 57.)

The judgment of the trial court reflects that the punishment was imposed pursuant to Section 215(2)(b) of the Texas Rules of Civil Procedure and "the inherent power of the Court to regulate the attorneys which practice before it . . . ." The judgment does not state the type of work to be performed by petitioner; it only describes it as "community service work." Apparently, the officials of the governmental agency have been delegated the authority to direct petitioner to do any type of manual labor they desire so long as it is related to the functions of their agency.

Petitioner and his client appealed to an intermediate appellate court which reversed the imposition of the fine against petitioner's client, but affirmed the judg-

ment directing petitioner to perform work for a governmental agency. Braden v. South Main Bank, 837 S.W.2d 733 (Tex.App.-Houston [14th] 1992, writ denied). The Texas Supreme Court declined to review the judgment of the intermediate court.

Unless this Court grants this petition and reverses the judgment, petitioner will be coerced, under threat of being held in contempt of court, to perform some type of "work" for a governmental agency.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE WORK ORDER WAS NOT PROHIBITED BY THE THIRTEENTH AMENDMENT.

Petitioner's position consists of a simple syllogism:

a. involuntary servitude is prohibited except as punishment for a crime;

b. petitioner has not been

convicted of a crime, nor has he disobeyed a court order, nor has he volunteered to perform work; therefore,

c. the order commanding him to perform work is prohibited.

This Court should grant the petition for a writ of certiorari because the Thirteenth Amendment was conceived "as a charter of universal civil freedom for all persons." Bailey v. Alabama, 219 U.S. 219, 241 (1911). Consequently, the right to be protected from work orders is a fundamental right which should be ardently protected. To condone an encroachment upon that right, however slight, is to raise the specter of work orders becoming an accepted remedy for breach of civil duty. The Thirteenth Amendment does not condone work orders in moderation - it states that involuntary servitude shall not "exist."

While the Thirteenth Amendment has been held inapplicable in certain situations,

none of the exceptions are analogous to this case. For example, in Robertson v. Baldwin, 165 U.S. 275, 282 (1897), this Court held that contracts of seamen, involving a surrender of personal liberty, may be enforced without regard to the Amendment. This is not analogous because petitioner has not contracted to render any services to the Child Protective Services Agency of Harris County. Nor, is this case analogous to those situations in which a government coerces the performance of services such as road work or military service. See Butler v. Perry, 240 U.S. 328 (1916); and, Arver v. United States, 245 U.S. 366 (1918). In these situations there is a statutory duty to perform a particular service, and a threat of criminal punishment is used to coerce performance of that specific service. That is not the case here. Petitioner has no statutory duty to perform services for the Child Protective Services

Agency of Harris County. In this case, work in behalf of a governmental agency is being ordered as the punishment itself. Conceptually, this case is akin to a situation in which a court orders a person to do work for a highway department or serve in the military as punishment for breach of a civil duty - only the governmental agency is different.

To uphold the judgment in this case would be to treat the unambiguous language of the constitutional prohibition as if it were a mere admonishment, subject to being disregarded whenever a judge deems it expedient to do so. Orders compelling citizens to perform work for breach of civil obligations are powerful weapons in the hands of those who would exercise autocratic power. For example, they might be utilized to compel a person who defaulted in payment of a debt to work for a creditor, or they might be used to force a migrant farm worker

who had breached an employment contract to toil for an employer. Work orders as remedies for breach of civil obligation are unknown to our jurisprudence, and this Court should exercise its jurisdiction to insure that work orders do not become an accepted remedy for breach of civil obligations.

II.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE TEXAS RULE AUTHORIZING "SUCH ORDERS . . . AS ARE JUST" IS NOT UNCONSTITUTIONALLY VAGUE.

The work order was made by the trial court under the "inherent power" concept and the authority of Texas Rule 215-2(b), authorizing a court to make such orders as are "just." The Texas Court of Appeals upheld the order under Rule 215-2(b). Petitioner asserts that the imposition of a work order under either standard violates his right to due process. Vague standards

deny due process because they permit arbitrariness and they fail to provide fair warning. Grayned v. City of Rockford, 408 U.S. 104 (1972).

It is improbable that this Court will ever be presented with standards which are more vague than the ones which have been utilized in this case. Using "justice" as an expression of the range of permissible punishment is the equivalent of authorizing the imposition of whatever punishment a judge deems fit. Utilizing "inherent power" to invent punishments amounts to the same thing. The standards contain no expression of the factors to be taken into consideration; they contain no expression of the types of punishment which are authorized; they contain no expression of the types of punishment which are prohibited; and, they contain no expression of the magnitude of punishment which is permissible. The concepts purport to confer the power to

punish unfettered by any rational standard.

Such standards are repugnant to the fundamental premise that the citizens of the United States are to be governed by rules of law, rather than the rules of particular individuals. A judge with the power to mete out such punishment as the judge deems fit has the apparent power to create unusual forms of punishment, to establish and apply personal normative standards, and to impose punishments which cannot be anticipated. In short, the imposition of innovative forms of punishment under such broad concepts is tantamount to a standardless exercise of judicial power. Just as all citizens are entitled to be informed as to what the state commands or forbids, they are also entitled to be informed as to what types of punishment are permissible.

III.

THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER RECEIVED ADEQUATE ADVANCE NOTICE.

The motion served on petitioner amounted to no notice. Petitioner was not advised that he was personally subject to being punished, and he was not afforded an opportunity to be heard until after the trial court had announced its order. Sanctions cannot be imposed without affording the offending party fair notice and an opportunity to be heard. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

The order in this case was entered in the context of imposing sanctions for breach of the rules governing the discovery responsibilities of attorneys. The nature of the punishment imposed and the procedure utilized exemplify a tendency toward arbitrary power and a disregard for due

process requirements in discovery sanction cases. This Court should grant the petition for a writ of certiorari to delineate the requirements of due process in the context of imposing sanctions against attorneys for breach of discovery responsibilities.

CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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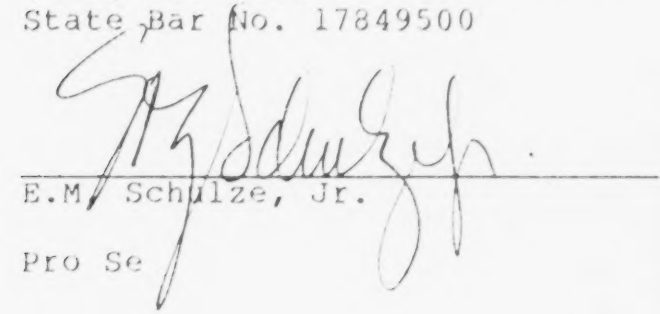

E.M. Schulze, Jr.

Pro Se

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Affirmed as Modified and Opinion filed
August 13, 1992.

In The

Fourteenth Court of Appeals

No. B14-91-01277-CV

DON T. BRADEN AND E.M. SCHULZE, JR., Appellants

V.

SOUTH MAIN BANK, Appellee

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 89-04947

OPINION

The parties entered into an agreed interlocutory judgment as to the merits of this lawsuit on July 24, 1990. It was

incorporated into a final judgment signed by the trial court on July 25, 1991, pursuant to South Main Bank's (the Bank) Motion for Entry of Final Judgment. The judgment settled all disputes between the parties except for the trial court's imposition of discovery sanctions, which are the subject of this appeal. The judgment of the trial court is affirmed as modified.

In 1988, Don T. Braden filed suit against the Bank and others in Montgomery County. The Bank took Braden's deposition on September 20, 1988. At the deposition, Braden was evasive and conferred with his attorney over sixty times. Braden v. Downey, 811 S.W.2d 922, 927 (Tex. 1991). In February of 1989, the Bank filed a motion to transfer venue to Harris County. This motion was granted. Because of the lack of information gained through the deposition process, the Bank sought additional facts through written discovery. In fact,

Braden's attorney, E.M. Schulze, Jr., "suggested" during Braden's deposition that the Bank should seek its information through interrogatories. In June of 1989, the Bank served Braden with its first set of interrogatories, requests for production of documents, and requests for admissions. Braden timely responded on July 18, 1989. The case was subsequently consolidated with a suit pending in Harris County which the Bank had previously commenced against other persons involved in the transactions out of which the litigation between Braden and the Bank arose. On November 16, 1989, after the consolidation, the Bank filed a motion to compel answers to interrogatories and requests for production and for sanctions. The Bank asserted that the responses, couched as objections, were frivolous and harassing. The motion sought $500 in attorney's fees under TEX. R. CIV. P. 215(d), a dismissal of Braden's suit if he

failed to comply within 20 days, and for any other relief to which the Bank might be entitled. On December 18, 1989, more than thirty days after this motion was filed and served, a hearing was held before the Honorable Daniel M. Downey, the presiding judge of the 295th Judicial District Court. As the docket was called, Judge Downey warned the lawyers on both sides that he believed discovery abuses were occurring, and that if he had to rule on the interrogatories in question someone would be sanctioned. [1] The trial court did not give any indication as to which party or attorney was in danger of being sanctioned. The warnings prompted both attorneys to leave the courtroom in an attempt to settle the discovery disputes. The attorneys

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1 The warnings were off the record; however, they were placed on the record at a later hearing as best as the parties and the court could remember.

returned to the courtroom without having reached an agreement. At that time, the trial court considered the Bank's motion to compel and for sanctions. The court went through the interrogatories to which Braden had objected. The objections made by Braden to many of the interrogatories in question were substantially as follows:

> This interrogatory is objected to because it is vague, ambiguous, overly broad, nonspecific, and unduly burdensome in requesting this party to "state all facts relied upon" in denying the claim. Under the Texas Rules of Civil Procedure the number of questions including subsections in a set of interrogatories shall be limited so as not to require more than thirty answers. An interrogatory requesting a party to "state all facts" in essence requests a party to state the entire substance of all testimony, documents, and other evidence which may be offered at trial. This would of necessity involve a narrative discourse encompassing more than thirty answers and would require the disclosure of work product.

Braden would also respond that he had been

questioned extensively about the matter in his deposition and to require him to respond again would be unduly burdensome. To other interrogatories Braden objected on grounds of relevancy or contended that the interrogatories required more than thirty answers, the limit set by TEX. R. CIV. P. 168. Out of the many interrogatories posed, Braden responded to approximately ten. The remaining interrogatories were objected to on one or more of the grounds stated above. The trial court agreed with Braden that the interrogatories violated Rule 168 because more than thirty answers were required. To remedy this, the trial court ruled on the interrogatories until it reached the thirty answer limit. The Rule 168 objection was the only objection sustained by the trial court. The trial court criticized Braden's other objections and overruled them. After hearing arguments from both sides, the trial court found that both parties were abusing

the discovery process in seeking and resisting discovery. On January 3, 1990, the trial court issued an order in which it found that Braden's answers to the interrogatories were unreasonably frivolous, oppressive and harassing. The trial court then ordered Braden to pay $10,000, as a sanction, to the Bank within 30 days and ordered Braden to answer the interrogatories and produce the requested documents. The court also ordered Braden's attorney to perform ten hours of community service at Child Protective Services of Harris County as a sanction. The attorney for South Main Bank was ordered to perform five hours of community service at Child Protective Services, apparently for violating Rule 168 and for combining all of the discovery requests in a single document. The court ordered that the community service be performed by both attorneys before February 15, 1990.

The Bank's attorney performed the community service ordered by the court and Braden timely complied with the trial court's order compelling answers to interrogatories and production of documents. However, appellants Braden and Schulze filed a Motion for Leave to File Petition for Writ of Mandamus in the Court of Appeals challenging the $10,000 sanction and the community service imposed on Schulze, but leave was denied. Appellants then filed a similar motion in the Texas Supreme Court. It granted appellants leave to file and conditionally granted a writ of mandamus "to direct Judge Downey to modify his order to defer payment of monetary sanctions and performance of community service until final judgment is rendered to allow Braden an opportunity to appeal." Braden, 811 S.W.2d at 930. The Supreme Court did not make a specific determination regarding the propriety of the sanctions. The trial court

conformed its final judgment to reflect the decision of the Supreme Court. On July 25, 1991, the trial court signed the final judgment from which Braden and Schulze appeal.

In their first point of error, appellants allege that the trial court erred in imposing sanctions against them because the objections to the discovery requests of the Bank were made prior to the time when the Harris County trial court acquired jurisdiction.

Rule 215(2)(b) states that if a party fails to comply with a discovery request, the "court in which the action is pending" is authorized to enter orders concerning the matter. TEX. R. CIV. P. 215(2)(b). Further, Rule 215(3) states that the authority to impose sanctions for abuse of the discovery process is conferred upon "the court in which the action is pending." TEX. R. CIV. P. 215(3). Appellants contend that since

the original discovery requests were propounded and objected to prior to the consolidation, Judge Downey was without jurisdiction to sanction them for any abuse of the discovery process. Appellants argue that the phrase "the court in which the action is pending" refers to the court in which the action is pending at the time the alleged abusive conduct occurs. We disagree with this interpretation.

Changes of venue, consolidations, and transfers of cases are everyday occurrences. These often occur when the parties are well into the discovery process. If we accept the argument made by appellants, the parties would be required to return to the original trial court for a determination as to the discovery abuse and for appropriate sanctions. Or, as appellants suggest, we should restrict the power of the trial court that finally acquires jurisdiction and allow it to consider only that alleged abuse which

takes place after it acquires jurisdiction. Neither of these approaches is practical. We refuse to accept appellants' hypertechnical construction and hold that the phrase "the court in which the action is pending" means just that. Appellants' first point of error is overruled.

In point of error number two, appellants allege the trial court erred in imposing sanctions against them because it is not an abuse of the discovery process to state objections to discovery requests.

Appellants cite the Texas Disciplinary Rules of Professional Conduct and the Texas Lawyer's Creed in support of their argument and claim that if the objections had not been made, Schulze would not have been "zealously" representing Braden as required. However, the Disciplinary Rules do not authorize an attorney to make frivolous and harassing objections to discovery requests. In fact, this conduct is specif-

ically mentioned in Rule 215. TEX. R. CIV. P. 215(3). The rule states, in pertinent part:

> If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may . . . impose any appropriate sanction. . .

TEX. R. CIV. P. 215(3)(emphasis supplied). Appellants' argument suggests that because the rule does not mention objections, any response or answer is not subject to sanctions if it is couched in terms of an objection. If this were the law, litigants could delay and obstruct the discovery process perpetually through objections, no matter how absurd those objections might be, without fear of penalties. This is not the law in Texas. We hold that the reference in

Rule 215(3) to answers or responses includes responses in the form of objections and as such, are subject to sanctions as are any other responses. Appellants' second point of error is overruled.

In their third point of error, appellants allege the trial court erred in imposing sanctions against them because the objections to the discovery requests were not frivolous and as a result, there was no factual basis for the trial court to find an abuse of the discovery process. Our review of the record bears out the trial court's finding that most of the objections made by appellants were frivolous and harassing. One glaring fact is that appellants made the same exact objection to almost all of the interrogatories posed by the Bank. That objection was set out in full earlier in this opinion. In Braden v. Downey, the mandamus action involving this very contention, the Supreme Court stated that

because Braden was "less than forthcoming" in his deposition, he foreclosed any subsequent objection to interrogatories on the ground that the Bank requested information provided in the deposition. Braden, 811 S.W.2d at 927. The court also held that the Bank's interrogatories were not so vague that it was an abuse of discretion for the trial court to order that they be answered. Id. at 927-28. Besides, the trial court sustained Braden's objections that the interrogatories exceeded the thirty answer limit set by Rule 168, and the Supreme Court held this rule establishes a boundary for the type of "contention interrogatories" posed by the Bank. Id. Therefore, Braden was sufficiently protected from any vague interrogatories. Lastly, Braden never asserted or presented any evidence on any applicable privilege. The Supreme Court concluded that Braden failed to demonstrate that the trial court abused

its discretion in ordering him to answer the Bank's discovery requests. The record supports this holding and the further holding that there was a sufficient factual basis for the trial court to conclude that appellants' objections were harassing and subject to sanctions. Appellants' third point of error is overruled.

In point of error four, appellants argue that the trial court erred in imposing sanctions against them because they were not provided with timely, advance notice that the trial court would consider the discovery abuse issue. Appellants allege this lack of notice denied them procedural due process. Appellants claim that they did not know that the trial court was going to "review their conduct under the abuse of discovery concept." They also argue that they were unaware that any monetary fine or community service might be imposed. Appellants claim that the only notice they had that their

conduct was going to be reviewed by the court and that they might be sanctioned for such conduct was an off the record, ambiguous warning by the trial court. The arguments propounded by appellants are tenuous at best when the record is reviewed.

On November 16, 1989, the Bank filed and served on the appellants, their Motion to Compel Answers to Interrogatories, Production of Documents, and for Sanctions. In this motion, the Bank claimed that Braden's responses to interrogatories were evasive and incomplete and therefore constituted a failure to answer. In its prayer, the Bank asked the trial court to compel Braden to answer certain interrogatories and requests for production; asked that a default judgment be entered in their favor if Braden failed to respond to the discovery requests within 20 days; and requested $500 in attorney's fees and any other relief to which it might be entitled.

A cursory review of the caption of the motion, the motion itself, and the prayer for relief were sufficient to put the appellants on notice that conduct during discovery was going to be reviewed by the trial court, and that the Bank was seeking sanctions. See Woodruff v. Cook, 721 S.W.2d 865, 870 (Tex.App.-Dallas 1986, writ ref'd n.r.e). Also, the transcript of the hearing held on December 18, 1989, reveals that the purpose of the hearing was to hear the Bank's motion to compel. At no time during the course of the hearing did Schulze object and argue that neither he nor his client had received adequate notice.

Imposing sanctions on a party without notice and an opportunity to be heard would violate the requirements of due process. See Worldwide Anesthesia Assoc., Inc. v. Bryan Anesthesia, Inc., 765 S.W.2d 445, 448 (Tex.App.-Houston [14th Dist.] 1988, no writ). Here, appellants were well aware of

the nature of the motion filed by the Bank and were aware that the purpose of the hearing was to make a determination as to that motion. Appellants were given notice of the hearing more than thirty days before it was held and were afforded all the due process they were entitled to. Appellants' argument is without merit, and point of error four is overruled.

In their sixth point of error, appellants contend the trial court erred in imposing sanctions against them because the type of sanctions that were imposed are not proper until the court has previously attempted to secure compliance with the discovery rules by less punitive means.

In TransAmerica Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991), the Supreme Court held that a sanction imposed for discovery abuse should be no more severe than necessary to satisfy its purposes. 811 S.W.2d at 917. Thus, the court reasoned,

trial courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance. Id. In Braden, The Supreme Court held that sanctions should not be so severe that a party's willingness or ability to continue the litigation will be significantly impaired. See Braden, 811 S.W.2d at 929. Appellants argue that based on the holdings in TransAmerica and Braden, the trial court abused it discretion by failing to consider the imposition of lesser sanctions.

In TransAmerica, the trial court struck TransAmerica's pleadings in their entirety and rendered a default judgment in favor of Toma on its counterclaim. Id at 916. The basis for this sanction was the failure of TransAmerica's president to appear for deposition. In effect, the trial court ordered the "death penalty" sanction for a single discovery abuse. The Supreme Court

held that the trial court had abused its discretion and that the sanction imposed was unjust under Rule 215. Id. at 919.

Appellants also cite Koepp v. Utica Mut. Ins. Co., 35 TEX. SUP. CT. J. 161 (November 23, 1991), in support of their argument. In Koepp, the trial court entered a take nothing judgment as a sanction for filing unverified and unsigned interrogatories one day late. Id. at 161. As in TransAmerica, the Supreme Court held that the trial court abused its discretion. Id. The court stated that sanctions which preclude the presentation of the merits of the case should not be assessed absent flagrant bad faith or callous abuse of the discovery process. Id at 162. Both of these cases are distinguishable from the case before us.

In TransAmerica and Koepp, the Supreme Court was addressing situations where the trial court had imposed the "death penalty"

sanction for a single discovery abuse. Here, no pleadings were struck and no default judgment was entered. Appellants were not prevented from presenting the merits of their case. When the Supreme Court in TransAmerica cautioned trial courts to consider the availability of less severe sanctions, we do not believe the court was referring to the type of sanctions imposed here. Rather than imposing the "death penalty" sanction, the trial court imposed a monetary sanction and community service. Thus, a sanction "less severe" than the "death penalty" was imposed.

In regard to appellants' argument under Braden, we believe that appellants have quoted the language from the case out of context. Appellants state that the Supreme Court characterized the sanctions in this case as being so severe as to raise "the real possibility that a party's willingness or ability to continue the litigation will

be significantly impaired. Braden, 811 S.W.2d at 929. However, in the sentence prior to the one quoted by the appellant, the Supreme Court qualifies its statement by stating that a sanction of the magnitude as the one in this case raises the possibility that the ability to continue the litigation will be impaired if it must be paid before any opportunity for supersedeas and appeal. Id.(emphasis supplied). Thus, the concern over the sanction in this case arose not over the amount of the sanction, but concerned whether a sanction of this amount must be paid prior to the opportunity for supersedeas and appeal. The Supreme Court cured this error in the mandamus action by requiring the trial court to delay the imposition of the sanctions until appellants were granted an opportunity for direct appeal. Id at 930-31. Since the sanction order was stayed, it could not have had a chilling effect on appellants' ability or

willingness to continue the litigation.

We believe the Supreme Court's reference in TransAmerica to less severe sanctions to be a caution to trial courts to consider less severe sanctions before imposing sanctions such as dismissal, entry of default judgment or the imposition of a monetary fine so great as to chill a litigant's ability to maintain his suit. Appellants' sixth point of error is overruled.

In their ninth point of error, appellants allege that the trial court erred in imposing a monetary fine and community service as sanctions for discovery abuse because those sanctions are not specifically authorized by TEX. R. CIV. P. 215.

Rule 215(3) states that a trial court may impose any appropriate sanction authorized by Rule 215(2)(b)(1), (2), (3), (4), (5), and (8). TEX. R. CIV. P. 215(3). None of these sections refers to monetary

fines or community service as possible sanctions, nor does Rule 215(3) contain the broad encompassing language "such orders as are just" as does Rule 215(2)(b). Because of this, The First District Court of Appeals held that when a party is sanctioned under Rule 215(3), the trial court is limited to the sanctions specifically listed in Rule 215(2)(b). Owens-Corning Fiberglas v. Caldwell, 807 S.W.2d 413, 415 (Tex. App.-Houston [1st Dist.] 1991, no writ). However, in TransAmerica, the Supreme Court rejected the holding of the First Court of Appeals and held that paragraphs 2(b) and 3 leave the choice of sanctions to the sound discretion of the trial court. TransAmerica, 811 S.W.2d at 917. The court went on to state that by referring to paragraph 2(b), paragraph 3 incorporates the language in paragraph 2(b) and the trial court may make any orders that are just. Id. The court held that the only pertinent inquiry is

whether the imposed sanctions under paragraph 2(b) or paragraph 3, are just. Id. Further, the Supreme Court, citing Braden v. Downey, specifically rejected the decision in Owens-Corning and held that the trial court does have authority to assess monetary fines as sanctions under Rule 215(3). TransAmerica, 811 S.W.2d at 921, n. 3 (Gonzalez, J., concurring); see Braden, 811 S.W.2d at 928-29. But see Clone Component Distribs. v. State, 819 S.W.2d 593, 597 (Tex.App.-Dallas 1991, no writ) (no citation to TransAmerica or Braden).

Appellants are correct in their assertion that monetary fines and community service are not specifically mentioned as possible sanctions in Rule 215. See TEX. R. CIV. P. 215(2)(b). However, in light of the language in TransAmerica and Braden, a trial court is not limited to the laundry list of specifically authorized sanctions even when the sanctions are assessed under Rule

215(3). TransAmerica, 811 S.W.2d at 921, n.3; see Braden, 811 S.W.2d 928-29;. Rule 215(2)(b) specifies eight sanctions, TEX. R. CIV. P. 215(2)(b)(1) through (8), as well as, in its introductory paragraph, "such orders in regard to the failure as are just." TEX. R. CIV. P. 215(2)(b). As long as the trial court's order is just and comports with the requirements of TransAmerica, the fact that the specific sanction assessed is not contained in Rule 215(2)(b) is not a ground for reversal whether sanction is assessed under Rule 215(2)(b) or 215(3). Appellants' ninth point of error is overruled.

In point of error ten, appellants argue the trial court erred in imposing monetary sanctions and community service sanctions because paragraph (2)(b) of Rule 215 authorizing "such orders . . . as are just" is vague. Appellants contend that under the circumstances of this case, the imposition

of these sanctions under this standard is a denial of due process. We disagree.

Paragraph 2(b) has been reviewed in many contexts by the intermediate appellate courts of this state and the Texas Supreme Court. We have been unable to find any case where the courts were confronted with the specific question of whether paragraph 2(b) is vague. However, within the numerous holdings, we can find no hint that any Texas court considers "such orders . . . as are just" ambiguous. This standard has long been accepted by the courts of this state as sufficient for reviewing the impositions of discovery sanctions. See, e.g., TransAmerica, 811 at 917. This standard is no more vague than other legal concepts such as "abuse of discretion." Even if it could be argued that the words, "such orders . . . as are just," are vague in and of themselves, the Texas Supreme Court has cured any potential problem with the test set out in

TransAmerica. In TransAmerica the court held:

> In our view, whether an imposition of sanctions is just is measured by two standards. First, a direct relationship must exist between the offensive conduct and the sanctions imposed. This means that a just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party. It also means that the sanctions should be visited upon the offender. Second, just sanctions must not be excessive. The punishment should fit the crime. A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes. It follows that courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance.

Id. The court went on to state that the above standards would set the bounds of permissible sanctions under Rule 215 within which the trial court is to exercise sound discretion. Id. With such guiding principles propounded by the Texas Supreme

Court, it is impossible to say that paragraph 2(b) is unconstitutionally vague. Appellents' tenth point of error is overruled.

In their eleventh point of error, appellants contend the trial court erred in imposing sanctions against them because the sanctions were not just or appropriate in this case.

A trial court may impose sanctions on any party that abuses the discovery process. Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986); TEX. R. CIV. P. 215. The discovery sanctions imposed by a trial court are within that court's discretion and will be set aside only if the court clearly abused its discretion. Bodnow, 721 S.W.2d at 840. Abuse of discretion occurs when the trial court fails to act with reference to any guiding rules and principles. Downer, 701 S.W.2d at 241-42. Another way of stating the test is whether

the act was arbitrary or unreasonable. Id. A trial court abuses its discretion in imposing discovery sanctions if the sanctions imposed are not just. TransAmerica, 811 S.W.2d at 917; see TEX. R. CIV. P. 215(2)(b). Whether sanctions are just is measured by two standards: (1) a direct relationship must exist between the offensive conduct and the sanction imposed; and (2) just sanctions must not be excessive. TransAmerica, 811 S.W.2d at 917. With these standards in mind, we will review the sanctions imposed on Braden and Schulze. Because the trial court assessed two types of sanctions, we will review the sanctions separately.

MONETARY SANCTIONS

The trial court ordered that Braden pay the Bank the sum of $10,000 as a sanction for abuse in resisting discovery under Rule 215(3). We note that no specific prayer for

$10,000 was made by the Bank in its Motion to Compel and for Sanctions. The Bank prayed for $500.00 in attorney's fees and any other relief to which it might be entitled. The only statements made and the only evidence presented before the trial court entered its sanction order on January 3, 1991, came from the Bank's attorney. He testified that if the case was required to go to the court of appeals, his expenses would be $5,000. No other evidence was presented at this hearing as to monetary sanctions. Thus, there is nothing in the record showing any connection between the $10,000 awarded and any harm suffered by the Bank as a result of the alleged discovery abuse. See Hanley v. Hanley, 813 S.W.2d 511, 521 (Tex. App.-Dallas 1991, no writ). The record does not reflect that $10,000 was anything more than an arbitrary amount. It was not requested by the Bank, nor did the Bank put on any evidence to support the

amount of $10,000. We hold that when a trial court assesses a monetary sanction, there must be some evidence in the record linking the amount awarded to harm actually suffered by the party seeking sanctions. The sanction imposed is not just because there is no direct relationship between the offensive conduct and the sanction imposed. See TransAmerica, 811 S.W.2d at 917. At the hearing held on July 9, 1991, the Bank's attorney did attempt to present evidence linking the $10,000 sanction to harm suffered by the Bank; however this evidence was presented approximately six months after the trial court had already awarded the $10,000 to the Bank. This was an attempt by the Bank's attorney to comply with the standards set forth in TransAmerica. In fact, the Bank's attorney stated on the record:

> Well, your Honor, in reading the Supreme Court opinion (sic) in

> Braden vs. Downey and in TransAmerica vs. Powell, I guess in order to made the record correct, assuming Mr. Schulze wants to take an appeal, I probably need to put on evidence as to some of the requirements or guidelines set forth in TransAmerica vs. Powell.

This "after the fact" evidence cannot be used to support the $10,000 sanction. The evidence was not before the trial court when the award was made and the record reflects that the trial court did not even consider this evidence. Therefore, we hold that the monetary sanction imposed against Braden is unjust and the trial court acted without reference to the applicable guiding rules. In light of our decision reversing the imposition of the monetary sanction, it is unnecessary to discuss appellants' points of error five and seven because they also challenge the monetary sanction imposed by the trial court.

The imposition of the monetary sanction was reversed by this court because there was no evidence presented by the Bank showing that the $10,000 was related to specific harm suffered by the Bank. In the case of the community service sanction, we do not believe that such evidence was required. As to this saction, all we must determine is whether the sanction imposed was just. First we must determine whether the sanction imposed is related to offensive conduct in question. It is clear from the record that the sanctions in this case were imposed because Mr. Schulze responded to the Bank's interrogatories with harassing and frivolous objections. The record further shows, and the Supreme Court recognized, that Mr. Schulze's conduct through the discovery process was less than professional. See Braden, 811 S.W.2d at 927. As stated by the

Supreme Court, a just sanction must be directed against the abuse and visited upon the offender. TransAmerica, 811 S.W.2d at 917. We hold that there is a relationship between the offensive conduct and the sanction imposed. Secondly, we must determine whether the sanction imposed was excessive. Mr. Schulze was ordered by the trial court to perform ten hours of community service at Harris County Child Protective Services. We believe this sanction is sufficient to satisfy the legitimate purposes of discovery sanctions. The purposes of discovery sanctions are to: (1) secure the parties' compliance with the rules of discovery, Ebeling v. Gawlik, 487 S.W.2d 187, 190 (Tex.Civ.App.-Houston [1st Dist.] 1972, no writ); (2) deter other litigants from violating the discovery rules, Downer, 701 S.W.2d at 242; Garcia Distrib. v. Fedders Air, 773 S.W.2d 802, 807 (Tex.App.-San Antonio 1989, writ denied);

and (3) punish parties that violate the rules of discovery, Jarrett v. Warhola, 695 S.W.2d 8, 9-10 (Tex.Civ. App.-Houston [14th Dist.] 1985, writ ref'd). Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986); Stoll v. Rothchild, 763 S.W.2d 437, 440 (Tex.App.-Houston [14th Dist.] 1988, writ denied). We were unable to find any Texas cases addressing this type of discovery sanction; however, we believe such a sanction can be just. In fact, this specific sanction was implicitly approved by the Texas Supreme Court in Braden when the court stated that it did not "criticize this type of creative sanction." Braden, 811 S.W.2d at 930. The community service sanction ordered by the trial court meets the standards set forth in TransAmerica. Therefore, the trial court did not abuse its discretion and its order as to the community service is affirmed.

Beyond their argument that the

community service sanction was unjust, appellants contend in their eighth point of error that the trial court erred in imposing this sanction because it violates the provision of the U.S. Constitution prohibiting involuntary servitude except as punishment for a crime, See U.S. CONST. amend. XIII, Sec. 1.

We have been unable to discover any cases, state or federal, which deal with this specific issue; however, we have found cases involving situations analogous to the one presented here. We first turn to cases involving assessment of sanctions under Federal Rule of Civil Procedure 11. The rule states, in pertinent part:

> . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction.

FED. R. CIV. P. 11. This rule, much like

TEX. R. CIV. P. 215(2)(b) and (3), provides for sanctions in the event of abuses. Rule 11 also gives a court discretion in the type of sanction to be imposed. There is little difference between an "appropriate sanction" and a "just" sanction. Like sanction cases under Rule 215, Rule 11 sanction cases are reviewed using an abuse of discretion standard and district courts are admonished, as are Texas trial courts, to tailor the remedy to fit the abusive conduct. See Jennings v. Joshua Ind. Sch. Dist., 948 F.2d 194, 196-97 (5th Cir. 1991) cert. denied, ___ U.S. _____, 112 S.Ct. 2303 (1992). In determining whether certain sanctions are appropriate for Rule 11 violations, courts have held that non-monetary sanctions are acceptable, and in fact encouraged, if such sanctions promote Rule 11's purposes of education, compensation, and deterrence. See Id.; Thomas v. Capital Sec. Serv. Inc., 836 F.2d 866, 877-78 (5th

Cir. 1988)(enbanc). In Thomas, the Fifth Circuit specifically mentioned the use of public or private reprimands as appropriate non-monetary sanctions, and the court stated that judges have broad discretion in choosing the appropriate penalty for Rule 11 violations. Thomas, 836 F.2d at 876-78. The court held that the considerable discretion vested in the trial court is authorized because of the use of the word "appropriate" in Rule 11. Id. at 876. We agree with the reasoning of the Thomas court, and hold that non-monetary sanctions are acceptable and authorized under the broad terms of TEX. R. CIV. P. 215. But, our inquiry cannot end here. Appellants do not complain that non-monetary sanctions are unacceptable, rather they contend the community service violates the involuntary servitude provision of the U.S. Constitution. Now that we have determined that non-monetary sanctions can be used for

Rule 215 violations, we turn to appellants' specific argument.

The cases most closely analogous to the argument raised by appellants are income tax cases in which the Internal Revenue Service (IRS) has attached a taxpayer's wages to satisfy past due taxes. In such cases, taxpayers have alleged that attaching wages constitutes involuntary servitude under the 13th Amendment, i.e. requiring the taxpayer to work on behalf of a governmental entity. Courts have expressly rejected this argument holding that any action taken or ordered by the IRS or a court stems from the conduct of the taxpayer and not from the party who ordered the attachment. See Detwiler v. United States, 406 F.Supp. 695 (E.D. Penn. 1975), aff'd, 544 F.2d 512 (3d Cir. 1976), cert. denied, 429 U.S. 1105 (1977); Beltran v. Cohen, 303 F.Supp. 889 (N.D. Cal. 1969). Therefore, the courts held that the concept of involuntary servitude was not invoked and

such action by the IRS did not violate U.S. CONST. amend. XIII, Sec. 1. Id. These cases are comparable to the instant situation. It is not the action of the court which has created the situation. Rather, Mr. Schulze's own conduct brought about the community service sanction. When one's own conduct results in discovery violations which causes a community service sanction to be assessed, the 13th Amendment is inapplicable. We hold that community service sanctions do not violate the 13th Amendment and are available as sanctions under Rule 215. Appellants' eighth point of error is overruled.

The judgment of the trial court is

affirmed as modified.

/s/ Paul C. Murphy
Justice

Judgment rendered and Opinion filed August 13, 1992.

Panel consists of Justices Murphy, Robertson and Cannon.

Publish - TEX R. APP. P. 90.

August 13, 1992.

JUDGMENT

The Fourteenth Court of Appeals

DON T. BRADEN AND E.M. SCHULZE, JR., APPELLANTS

No. B14-91-01277-CV

V.

SOUTH MAIN BANK, APPELLEE

This cause, an appeal from the agreed judgment in favor of South Main Bank, appellee, signed July 25, 1991, came on to be heard on the transcript of the record. We have inspected the record and find the trial court erred in ordering Don T. Braden, appellant, to pay $10,000 to South Main Bank, appellee, as sanctions for abusing the discovery process because there is no evidence in the record to connect the monetary sanction to any harm suffered by South Main Bank as a result of the alleged

discovery abuse. We therefore REFORM the judgment of the court below and order the trial court to delete that portion of the judgment ordering Don T. Braden, appellant, to pay $10,000 to South Main Bank, appellee, as sanctions for abusing the discovery process.

We order the remainder of the judgment AFFIRMED except as heretofore modified.

We order Don T. Braden and E.M. Schulze, Jr., appellants, jointly and severally, to pay all costs incurred because of this appeal.

We order this decision certified below for observance.

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

January 20, 1993

Mr. E.M. Schulze, Jr.
Davis, Durham & Schulze
P.O. Box 671
Huntsville, TX 77342-0671

Mr. Randall A. Pulman
Stumpf & Falgout
1400 Post Oak Blvd.
Suite 400
Houston, TX 77056

RE: Case No. D-2975

Style: E.M. SCHULZE, JR.
V. SOUTH MAIN BANK

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

/s/ Michael C. Murphey
Deputy Clerk

No. 89-04947

SOUTH MAIN BANK	X	IN THE DISTRICT
	X	
V.	X	
	X	
FM 149 BUSINESS PARK, LTD., LOUIS R. BRADEN, WILLIAM C. BRADEN, JR., MICHAEL HAJOVSKY, KENNETH BEVERLY, B&H JOINT VENTURE, DON W. BOYETT, ANTHONY D. CARIDI, and MARION R. CLARK	X	COURT OF HARRIS COUNTY, TEXAS 295TH JUDICIAL DISTRICT

CONSOLIDATED WITH
No. 89-09726

DON T. BRADEN	X	IN THE DISTRICT
	X	
V.	X	COURT OF
	X	
SOUTH MAIN BANK, LOUIS R. BRADEN, W.C. BRADEN, JR., ANTHONY CARIDI, BEVERLY HAJOVSKY & CO., a Texas partnership, FRED W. CARLEY, and CARL STOCKHOLM	X	HARRIS COUNTY, TEXAS 190TH JUDICIAL DISTRICT

FINAL JUDGMENT

ON the 9th day of July, 1991, came on to be heard the motion for entry of final judgment of Plaintiff, South Main Bank. The

Court, having reviewed said motion, the response thereto filed by Don T. Braden and the testimony presented, is of the opinion that said motion is meritorious and should be granted. It is, therefore,

ORDERED that pursuant to Justice Nathan L. Hecht's opinion delivered June 19, 1991 in Case No. C-9438, Don T. Braden, Relator, v. Honorable Daniel M. Downey, Judge of the 295th District Court of Harris County, Texas, Respondent, the Court hereby modifies its order of January 3, 1990 in the following respects:

The Court finds that Don T. Braden has abused the discovery process in seeking or resisting discovery. The Court further finds that with respect to Don T. Braden, that Don T. Braden has filed or made answers to discovery which are unreasonably frivolous, oppressive, and constitute harassment pursuant to Tex.R.Civ.P. 215(3). This finding is based upon Don T. Braden's

conduct during his deposition of September 20, 1988, and Don T. Braden's failure to answer the interrogatories and document requests described in this Court's order of January 3, 1990. The court finds that Braden's abuse of the discovery process caused South Main Bank to incur reasonable and necessary attorneys' fees of $2,687.50. It is, therefore,

ORDERED, ADJUDGED AND DECREED that South Main Bank have judgment of, from, and against Don T. Braden in the amount of $2,687.50 as a discovery sanction pursuant to Tex.R.Civ.P. 215 Sec. 2b(8). It is further,

ORDERED, ADJUDGED AND DECREED that, pursuant to Tex.R.Civ.P. 215 Sec. 2b and the inherent power of the Court to regulate the litigants which appear before it, Don T. Braden pay additional sanctions to South Main Bank for such abuse in the amount of $7,312.50. It is further,

ORDERED, ADJUDGED AND DECREED pursuant to Tex.R.Civ.P. 215 Sec. 2b and the inherent power of the Court to regulate the attorneys which practice before it, that the attorney for Mr. Braden, Mr. E.M. Schulze, Jr., is hereby ordered to report to the Child Protective Services Agency of Harris County, Texas, where he will produce and perform ten (10) hours of community service work between now and thirty (30) days from entry of this order, unless an appeal is taken by Don T. Braden or Mr. E.M. Schulze, Jr. In such event, Mr. Braden is to perform his community service work within thirty (30) days from the expiration of all rights of appeal. Mr. Schulze is to produce evidence of compliance with this Court's order within forty (40) days from the entry of the order, or forty (40) days from the expiration of all rights of appeal. It is further,

ORDERED, ADJUDGED AND DECREED that South Main Bank ("SMB") have judgment of,

from and against Don T Braden in the amount of $140,000.00 together with interest at the rate of 10% per annum from the date hereof until paid; it is further,

ORDERED, ADJUDGED AND DECREED that SMB have judgment of, from and against B&H Joint Venture in the amount of $77,500.00 together with interest at the rate of 10% per annum from the date hereof until paid; it is further,

ORDERED, ADJUDGED AND DECREED that SMB have judgment of, from and against Michael Hajovsky in the amount of $25,833.33 together with interest from the date hereof at 11% per annum until paid; it is further,

ORDERED, ADJUDGED AND DECREED that SMB have judgment of, from and against Kenneth Beverly in the amount of $25,833.33 together with interest from the date hereof at 11% per annum until paid; it is further,

ORDERED, ADJUDGED AND DECREED that SMB have judgment of, from and against William

C. Braden, Jr. in the amount of $38,500.00 together with interest from the date hereof at 11% per annum until paid; it is further,

ORDERED, ADJUDGED AND DECREED that SMB have judgment of, from and against Louis R. Braden in the amount of $38,500.00 together with interest from the date hereof at 11% per annum until paid; it is further,

ORDERED, ADJUDGED AND DECREED that SMB have judgment of, from and against Marion Clark in the amount of $40,000.00 with interest at a rate of 8% per annum until paid; it is further

ORDERED, ADJUDGED AND DECREED that this Court's prior order of August 3, 1989 granting SMB summary judgment against FM 149 Business Park, Ltd., a Texas limited partnership, and William Braden, Jr., is hereby adopted and that SMB have judgment against FM 149 Business Park, Ltd., a Texas limited partnership, in the amount of $293,751.60 together with interest in the

amount of 11% per annum from the date hereof until paid; it is further,

ORDERED, ADJUDGED AND DECREED that a take-nothing judgment is hereby entered against Don T. Braden on all his claims against SMB; it is further

All relief not specifically granted herein is hereby denied. South Main Bank is entitled to all writs necessary to enforce this judgment.

DONE this 9th day of July, 1991.

/s/ Daniel M. Downey,
Judge Daniel M. Downey,
Presiding

APPROVED:

STUMPF & FALGOUT

/s/ Randall A. Pulman
Randall A. Pulman
State Bar No. 16393250
1400 Post Oak Boulevard, Suite 400
Houston, TX 77056
(713) 871-0919
(713) 871-0408 (Telefax)

ATTORNEYS FOR SOUTH MAIN BANK

No. 89-04947

SOUTH MAIN BANK	X	IN THE DISTRICT
	X	
V.	X	
	X	
FM 149 BUSINESS PARK, LTD., LOUIS R. BRADEN, WILLIAM C. BRADEN, JR., MICHAEL HAJOVSKY, KENNETH BEVERLY, B&H JOINT VENTURE, DON W. BOYETT, ANTHONY D. CARIDI, and MARION R. CLARK	X	COURT OF HARRIS COUNTY, TEXAS 295TH JUDICIAL DISTRICT

CONSOLIDATED WITH
No. 89-09726

DON T. BRADEN	X	IN THE DISTRICT
	X	
V.	X	COURT OF
	X	
SOUTH MAIN BANK, LOUIS R. BRADEN, W.C. BRADEN, JR., ANTHONY CARIDI, BEVERLY HAJOVSKY & CO., a Texas partnership, FRED W. CARLEY, and CARL STOCKHOLM	X	HARRIS COUNTY, TEXAS 190TH JUDICIAL DISTRICT

PLAINTIFF SOUTH MAIN BANK'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES, PRODUCTION OF DOCUMENTS, AND FOR SANCTIONS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiff SOUTH MAIN BANK

("SMB" herein) and moves this Court as follows:

1. On June 15, 1989, SMB served Don T. Braden ("Braden" herein), with SMB's First Set of Interrogatories, Request for Production of Documents, and Requests for Admission of Facts to Don T. Braden ("SMB's Request for Discovery"), pursuant to Tex. R. Civ. P. 167, 168, and 169. A true and correct copy of the SMB's Request for Discovery is attached as Exhibit "A".

2. On July 18, 1989, Braden served his Response to Request for Production, Admissions and Interrogatories pursuant to SMB's Request for Discovery, a true and correct copy of which is attached hereto as Exhibit "B". SMB propounded twenty-five interrogatories. Braden responded with five repetitive and elusive objections to seventeen of the twenty five interrogatories.

3. All of Braden's responses are evasive and incomplete answers which should

be treated as a failure to answer. See Tex. R. Civ. P. 215(1)(c). SMB groups the interrogatories and Requests for Production together with Braden's objections and answers.

I.

Interrogatory No. 2: Please identify every person having knowledge of any matter relevant to or reasonably calculated to lead to the discovery of admissible evidence in the pending action.

Braden's response: To the knowledge of this party, the only persons having knowledge of relevant matters are the parties to this lawsuit, the parties to Cause No. 89-04947, the persons mentioned in my deposition taken on September 20, 1988, and respective attorneys of the parties. The addresses and business affiliations of these persons are already known to you. To require this party to compile a list of addresses is unduly burdensome.

4. Braden's answer is insufficient. Braden must name the persons which have relevant knowledge. Tex. R. Civ. P. 166b(2)(d) ("a party may obtain discovery of the identity and location . . . of any

potential party and of persons having knowledge of relevant facts"); Farm Serv. v. Gonzales, 756 S.W.2d 747 (Tex.App.-Corpus Christi 1988, writ denied) (respondent to interrogatories must disclose identity of all persons having knowledge of any fact concerning incident). Braden has clearly failed to meet the request.

II.

Interrogatory Nos. 3, 4, 5, 7, 9, 13(c), 13(d), 13(e), 14(c), 14(d), 14(e), 15, 17, 18, 20, 22 and 23. All of these interrogatories inquire into the substance of Braden's counterclaim against SMB and his defenses to SOUTH MAIN BANK's claims.

Braden's response: These interrogatories are vague, ambiguous, overly broad, non-specific, and unduly burdensome in requesting this party to state all facts relied upon, state in detail, or state with specificity. The number of questions including subsections in this set of interrogatories is not limited to thirty answers.

5. The respondent to an interrogatory may be requested to "specify in detail each and every" fact which is the basis of his

claim. Teer v. Duddleston, 641 S.W.2d 569, 578 (Tex. App.-Houston [14th Dist.] 1982) rev'd on other grounds, 664 S.W.2d 702 (Tex. 1984). Courts have been quite willing to allow requests for specific information. See Garcia v. Allen, 751 S.W.2d 236, 237 (Tex.App.-San Antonio 1988, writ denied); see also Alexander v. Barlowe, 671 S.W.2d 531, 533 (Tex.App.-Houston [1st Dist.] 1983, writ ref'd.). The shotgun approach used by Braden is apparent when reviewing Interrogatory No. 13 which goes to the heart of Braden's claim.

6. Besides being legally insufficient, Braden has failed to show the Court how the discovery is unduly burdensome, costly or harrassing to produce. Independent Insulating Glass v. Street, 722 S.W.2d 798, 802 (Tex.App.-Ft. Worth 1987, writ dism'd.). A trial court without this information cannot make an informed decision to limit discovery or on where to place the

cost for complying with the discovery. Id. Braden's objection does not give any reason for the burdensome nature of the request.

III.

Interrogatory Nos. 3, 4, 5, 9, 10, 13(c), 13(d), 13(e), 14(c), 14(d), 14(e), 15, 17, 18, 20, 21 and 22. All of these interrogatories inquire into the substance of BRADEN's counterclaim against SOUTH MAIN BANK and his defenses to SOUTH MAIN BANK's claims.

Braden's response: These interrogatories have been answered because Don T. Braden has been extensively examined at deposition about these very same matters. To now inquire about these same matters in interrogatories is unduly burdensome.

7. Braden's objection that the interrogatories exceed thirty answers is not supported by any case law. In cases which address the subject matter, the discovering party clearly propounded interrogatories which exceeded thirty request. SMB has propounded twenty five interrogatories as found in SMB's Request for Discovery.

8. This objection is also legally

insufficient. The prior deposition testimony of a party does not preclude specific interrogatories. Second, Braden has not stated with specificity the burdensome nature of the interrogatories. Third, Braden's deposition was taken on September 20, 1988. Since that time, Braden has added a DTPA claim against SMB, and SMB has counterclaimed against Braden on his guaranty. Therefore, this objection is without merit.

IV.

Interrogatory No. 12 and Request for Production No. 2. These discovery requests inquire into some of Don T. Braden's other business dealings which would undermine his position as an unsophisticated investor.

Braden's response: This interrogatory and request for production does not concern a matter which is relevant to the subject matter in the pending action and it is not reasonably calculated to lead to the discovery of admissible evidence. This suit does not concern any property at Walden on Lake Conroe, and Dalton International is not a party.

9. A party may seek discovery which

is reasonably calculated to lead to admissible discovery. Tex. R. Civ. P. 166b(2)(a). Braden claims several causes against SMB because he is an unsophisticated investor. Information concerning Bradens' investment history is relevant to these claims and may lead to discoverable information. Moreover, Don Braden waived these objections by failing to make them at his deposition. See Exhibit "C" at p. 35-36.

V.

Request for Production No. 5. Produce any and all documents which may lead to the discovery of admissible evidence in this case or which are relevant to any claim made by a party in this lawsuit.

Braden's response: This request does not "set forth the items to be inspected either by individual item or by category, and does not describe each item and category with reasonable particularity" as is required by Rule 167, Texas Rules of Civil Procedure.

10. To date there has not been any opinion published or decision made which rules on this request for production

objectionable. There is not a material difference between this request and a request for the identity of all witnesses as allowed by rule 168 and as permitted by the courts. Braden should not be permitted to introduce documents into trial which have not been produced prior to trial.

11. SMB would show that attorneys' fees of $500 should be awarded to counsel for SMB for the preparation and filing of this motion.

WHEREFORE, PREMISES CONSIDERED, SMB as plaintiff prays that this Court enter an Order as follows:

1. That Braden is compelled to answer interrogatory Nos. 2, 3, 4, 5, 7, 9, 10, 12, 13(c), 13(d), 13(e), 14(c), 14(d), 14(e), 15, 17, 18, 20, 21, 22, and 23 and Request for Production Nos. 2 and 5 pursuant to Rule 215(b);

2. That Braden is ordered to pay to SMB's counsel the sum of $500 as attorneys' fees for the preparation and filing of this Motion as required pursuant to Rule 215(d).

3. That Braden's Second Amended Original Petition are stricken and that the action is dismissed with prejudice and that a default judgment be taken against Braden if the answers to SMB's Request for Discovery are not served within 20 days from the signing of the appended Order.

And for all other relief, both general and special, at law and in equity, to which the

Defendant may show itself entitled.

Respectfully submitted,

STUMPF & FALGOUT

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ATTORNEYS FOR SOUTHMAIN BANK

CERTIFICATE OF SERVICE

This is to certify that on the 16th day of November, 1989, a true and correct copy of the above and foregoing document was forwarded by certified mail, return receipt requested to:

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Randall A. Pulman

SMB/FM149/COMPEL.MOT

(EXHIBITS OMITTED)